SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

NO.

IN THE MATTER OF THE ESTATE OF HARRIS R. WATKINS,
Deceased,

HOWARD NATIONAL BANK AND TRUST COMPANY, -
Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The salient facts and the questions involved in the Petition for Certiorari to which this brief is addressed have been stated in the petition. A specification of particular rulings of the Vermont Supreme Court and particular facts in the light of which they were made should be helpful in considering the questions of law herein briefed. Such a specification is included as "I" hereof.

I

THE VERMONT SUPREME COURT HELD THAT THE CONSOLIDATION INVOLVED WAS NOT IN CONTRAVENTION OF THE LAW OR PUBLIC POLICY OF VERMONT, DID NOT REQUIRE SPECIFIC STATUTORY AUTHORITY FROM THE STATE, WAS VALIDLY EFFECTED, DID NOT DESTROY THE CORPORATE IDENTITY OF THE STATE BANK OR TERMINATE ITS

EXECUTORSHIP, ALTHOUGH ALL THE ASSETS OF THE ESTATE WERE IN THE POSSESSION OF AND WERE MANAGED BY THE CONSOLIDATED BANK.

1. The Vermont Supreme Court said with reference to the legality of the consolidation, "Specific authorization was not necessary (citing cases). We hold that the consolidation of the City Trust Company and the Howard National Bank was not in contravention of our law, or of our public policy." (*Op. par. 12, Rec. 54.*)

2. The court noted that no question was made but that the steps prescribed by law were taken and certificate of approval issued by the Comptroller; it declared the objection as to contravening state law unfounded (*Op. par. 12, Rec. 54*) and throughout treated the consolidation as valid.

3. The consolidation did not destroy the corporate identity of the state bank or terminate its executorship. This destruction and termination was held to have been effected by taxation and control exercised by the state after consolidation. (*Op. par. 14, Rec. 55, par. 20, Rec. 58, par. 24, Rec. 60.*) The Court said:

> . . . . "No statute of this state declared the charter of the trust company void upon the event of consolidation." (*Op. par. 14, Rec. 55.*)
>
> . . . . "City Trust Company, not having paid its annual license tax ceased to exist as a corporation upon April 1 of that year (1932). Its authority as executor was thereupon extinguished" . . . . (*Op. par. 20, Rec. 58.*)
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> . . . . "The Court might, after the dissolution of City Trust Company's charter, have appointed the petitionee administrator with the will annexed" . . . . (*Op. par. 24, Rec. 60.*)

4. The Vermont Supreme Court recognized that at the time of consolidation the consolidated national bank took possession of the assets of the estate and managed the affairs previously conducted by City Trust Company. (**Op. par. 10, Rec. 53.*) The Court said:

* From F. 7 Rec. 26 and F. 17 Rec. 28.

"On or about the date of the consolidation the petitionee took possession and control of the assets of the estate and proceeded to act as executor, although it did not apply for appointment as administrator or furnish a bond and it has never received an appointment as administrator from the Probate Court. On July 31, 1931, it was appointed trustee of the trust fund established by the will, but the fund has never been decreed to it as such trustee. After March 12, 1931, the directors of the City Trust Company never took action as a board and the affairs previously conducted by that company were directed and controlled by the directors and officers of the petitionee."

5. In Vermont the office of executor is held by virtue of the testator's selection and not as the result of judicial appointment. (*Op. par. 16, Rec. 56.*) The Court said:

"In our law an executor is a person, or corporation empowered to discharge the duties of a fiduciary, appointed as such by the testator in his will. The Probate Court has no power of choice, for the office is held by virtue of the testator's selection."

II

THE VERMONT SUPREME COURT ASSERTS THAT, BECAUSE OF LACK OF AFFIRMATIVE CONSENT BY THE STATE OF VERMONT, THE CONSOLIDATION DID NOT OPERATE UPON THE RIGHT OF CITY TRUST COMPANY "TO BE A CORPORATION"; AND THAT THEREBY THE CONSTITUENT CORPORATION REMAINED SUBJECT TO STATE CONTROL, TAXATION AND DESTRUCTION. THIS IS A QUESTION OF FEDERAL POWER AND LAW.

In its opinion (*Pars. 19-20, Recs. 57-58*) the Vermont Supreme Court said:

"As we have seen, the petitionee asserts that since the date of the consolidation the State of Vermont has been without power to regulate, control or terminate its corporate existence. We do not adopt this view. The 'franchise'

> of the state bank, the transfer of which is provided for in the Act of Congress (12 U. S. C. A. § 34 a), 'cannot mean its right to be a corporation. The right to transfer franchise powers of a corporation organized under the laws of one sovereignty to a corporation organized under the laws of a different sovereignty is extraordinary. It cannot be implied in the absence of explicit statutory enactment to that end.' (Citing cases discussed below.) At the time of the consolidation in the present case there was no statute of this State permitting the transfer of the City Trust Company's right to be a corporation.' This right therefore, remained subject to our law."
>
> "It follows that the State of Vermont had the power to terminate the corporate existence of the City Trust Company in accordance with G. L. 1046 (now P. L. 1000) providing that: 'Every corporation shall . . . . cease to exist as such corporation on the first day of April in any year during which such corporation has not, on or before such date, filed its annual license tax returns for the fiscal year beginning with the first day of the preceding February and has not on or before the first day of April in such year paid to the state the annual license tax for such fiscal year' . . . ."

Thus, the Vermont court asserts that:

(1) It is not the intent of the federal consolidation statute to include the primary corporate franchise.

(2) This result cannot be accomplished by the consolidation without affirmative permission of the state.

(3) The state retains jurisdiction to regulate, control, tax and destroy the state corporation.

Each of these assertions raises a federal question, the first as to the meaning of the federal statute, the second as to the power of the federal government and the third as to power of the state to affect consolidated national banks after consolidation by continued regulation, control, taxation and destruction of constituent state banks. On these questions federal law is paramount.

> *Ex parte Worcester County National Bank*, 279 U. S. 347, at 359, 49 S. Ct. 368, 73 L. ed. 733.
>
> And see *infra* V.

The Vermont court cites as its authority decisions of courts of other states and an affirmance by this court of one of those decisions. As indicated below that affirmance is no authority for the rule asserted by the Vermont court; and the decisions relied upon are not in accord with the law of the United States, as shown by the discussion below (III, IV and V). This is the more readily apparent when the authorities relied upon by the Vermont Court are examined in the light of the law and facts of the instant case, as shown by the record, including the opinion of the Vermont Supreme Court. The cases relied upon by the Vermont Court are *Petition of Worcester County National Bank*, 263 Mass. 444 (45) 162 N. E. 217, "220"; affirmed 279 U. S. 347, 357,* *Com. to use of Grammes* v. *Merchants National Bank*, 323 Pa. 145, 185 A. 823, 826,* and *Com.* v. *First National Bank and Trust Company*, 303 Pa. 241, 154 A. 379, 382.*

In the Massachusetts case, reviewed by this Court, the holding of the Massachusetts court was summarized by this court. In Massachusetts an express statute rendered void the charter of any state bank merging into another bank (279 U. S. at 356). After quoting that statute, this court said of the decision of the Massachusetts Court:

> "*With this qualification*† the court found the field to be left open, under Massachusetts law, to the exercise by Congress of whatever power it possessed over the subject" (of consolidation of a state bank with a national bank) (279 U. S. 356)
>
> .....
>
> "It (the Massachusetts court) referred again to the provision of the state law that upon the consolidation, the charter of the trust company should be 'void except for the purpose of discharging existing obligations and liabilities.' It held that the word 'franchises' directed to be transferred to the national bank by virtue of section 3 did not mean its charter of its right to be a corporation, *for that would be in contravention of the law of the Commonwealth:** that it

*Local citations by the Court.
†Italics supplied.

> was only the national bank that retained its corporate identity; that the certificate of the Comptroller did not constitute a charter, but only his approval of the consolidation; that *the Trust Company had gone out of existence** and all its property had become the property of the consolidated bank and that the latter was not a newly created organization but an enlargement of the continuously existing national bank. Thus the court found that the identity of the trust company had not been continued in a national bank, *but had been extinguished*"* (279 U. S. 357, 358).

Thus it was the holding of the Massachusetts court, as interpreted by this court, that a Massachusetts statute operated as a qualification of the "open" field for the operation of the federal statute and the Massachusetts charter could not be transferred under the designation of "franchise," "for that would be in contravention of the law of the Commonwealth" of Massachusetts.

But the law of Vermont has no such "qualification" of the "open" field for the operation of the federal statute. The decision in the *Worcester Bank* case is therefore not an authority with respect to consolidation of a Vermont trust company into a national bank.

The next case cited by the Vermont court, *Commonwealth* v. *First National Bank and Trust Company* (303 Pa. 241, 154 A. 379), arose in 1931 following the consolidation of a Pennsylvania trust company with a national bank. The Pennsylvania Commissioner of Banking directed the trust company after the consolidation to petition the Pennsylvania court for a decree of dissolution. The consolidated bank and trust company entered as respondent claiming that the effect of the consolidation under the federal statute "was to extinguish the trust company." Pennsylvania had no statute in contravention of the consolidation or recognizing the consolidation as working a dissolution of the state corporation. It did have a statute providing for dissolution of the corporation by petition: The Pennsylvania court held that as a result of the

* Italics supplied.

separate sovereignty of the state and nation "The United States has no power to create or destroy Pennsylvania corporations." The court held that it was not the intent of the federal act to merge the charter of the trust company with that of the national bank, relying upon the decision of the Massachusetts court in the *Worcester* case, *supra,* and the affirmance of that decision by this court and quoting from the summary of the ruling of the Massachusetts court, which appears in the decision of this court. It fails, however, to recognize that the opinion of the Massachusetts court, so quoted, was based, as above indicated, upon the Massachusetts statute.

The Pennsylvania court found the case "analogous to that of a state bank or trust company organized under state laws converting itself into a national bank." It said: "Such a conversion of the state bank does not dissolve the state corporation. It is merely a change of title and governmental supervision" (154 A. at 381). In support of the foregoing statements the court quoted from *Michigan Insurance Bank* v. *Eldred,* 143 U. S. 293, and *Metropolitan National Bank* v. *Claggett,* 141 U. S. 520, to the effect that the result of conversion is that the state bank becomes a national bank without affecting its identity; it is under a changed jurisdiction, but it remained "one and the same bank, ... doing business uninterruptedly." The Court concluded that

> "It would be derogatory to the rights and dignity of this sovereign state for her courts to hold that an act of the Congress of the United States, or something done pursuant thereto could extinguish the life of the Pennsylvania corporation, without Pennsylvania's consent" (154 A. at 382).

The other case relied upon by the Vermont Court, *Commonwealth* v. *Merchants National Bank,* 323 Pa. 145, 185 Atl. 823, involved an action against a consolidated national bank on account of the obligation of a constituent state bank. It was claimed by way of defense that the liability was not assumed and that there was "no legal consolidation of the two corporations from which

liability could be implied." The court held that under the local law the state bank might have been converted into a national bank and then under the federal law, consolidated with another national bank. But the Court felt that in view of *Hopkins Federal Savings and Loan Association* v. *Cleary*, 296 U. S. 315, "342," 56 S. Ct. 235, 80 L. ed. 251, 100 A. L. R. 1403, the decision in *Casey* v. *Galli*, 94 U. S. 673, 24 L. ed. 168, "cannot be given the comprehensive effect, as limiting the power of the commonwealth" claimed for it; that the Tenth Amendment did not permit federal legislation to confer authority on the trust company to consolidate its franchise and property with those of the bank. "What was lacking to make the consolidation *de jure* was authority from the commonwealth pursuant to whose law the trust company existed. The consolidation described did not, therefore, transfer to the bank the trust company's franchise to be a corporation and work its dissolution." But the court held that there was a *de facto* consolidation, carrying with it the obligation to pay the debt in question.

The Pennsylvania court thus holds that, without the express consent of the state, the national government could not absorb the corporate franchise of the state corporation, although it took over its property and obligations (185 A. at 826), and left the state corporation "in a state of suspended animation" (154 A. 380). If the Pennsylvania decision in the *Merchants National Bank* case makes express consent necessary to *de jure* consolidation, that requirement is not in accord with the Vermont rule. For the Vermont Supreme Court said as to consolidation in the instant case, "Specific statutory authorization was not necessary," citing *Casey* v. *Galli*, and *Petition of Worcester County National Bank*, "162 N. E. at page 230."

Thus the Vermont court declines to follow the above implications of the holding of the Pennsylvania court in *Commonwealth* v. *First National Bank*. Instead it held that while the federal government may take over a state corporation without affirmative

permission from the state, it may not absorb the corporate franchise unless it has affirmative permission from the state, and that the state retains power to regulate, control, tax and destroy the constituent state corporation after consolidation notwithstanding resultant injury to the consolidated national bank. The error of this holding is shown below.

III

THE UNITED STATES HAS THE POWER TO CONSOLIDATE A STATE BANK INTO A NATIONAL BANK WITH TRANSFER OF ALL RIGHTS, AS SPECIFIED IN THE STATUTE, EXCEPT AS SUCH A CONSOLIDATION IS IN CONTRAVENTION OF STATE LAW. AFFIRMATIVE CONSENT IS NOT REQUIRED TO GIVE FULL EFFECT TO SUCH A CONSOLIDATION.

In the only case in which this court passed upon the question of state consent, the Massachusetts court had concluded that no state legislation was necessary to accomplish the consolidation of a Massachusetts trust company with a national bank under the authority of the federal statute. This court said that it was in agreement "with the conclusions of the Supreme Judicial Court in respect to legality of the consolidation of the trust company and the national bank."

> *Ex parte Worcester County National Bank*, 279 U. S. 347, 357, 360.

In accord upon this point:

> *Adams* v. *Atlantic National Bank*, 115 Fla. 399, 155 S. 648.
> *First National Bank* v. *Chapman* (1929), 160 Tenn. 72, 22 S. W. (2d) 245.
> *Central United National Bank* v. *Abbott*, 135 Ohio. St. 37.

Hopkins Federal Savings, etc., Association v. *Cleary*, 296 U. S. 315, 56 S. Ct. 235, 80 L. ed. 251, 100 A. L. R. 1403, is relied upon in the later Pennsylvania case cited by the Vermont Court. But

that case is no authority for the theory of the necessity of affirmative consent. There this court had under consideration a statute which omitted the proviso that the conversion shall "not be in contravention" of the state law, which since 1913 has been a part of the bank conversion statute and has been incorporated in other conversion statutes and in the statute as to consolidation of state banks into national banks. The court held that the omission indicated the intention of Congress too distinctly to be ignored; and that "the Home Owners Loan Act, *to the extent that it permits conversion of state associations into federal ones in contravention of the laws of the place of their creation,** is an unconstitutional encroachment upon the reserved powers of the state" (296 U. S. at 335). The court did not assert the necessity of affirmative consent to conversion; and it recognized the possible distinction between the powers of Congress in "respect of banks of issue and deposit and its power in respect of associations to encourage industry and thrift." The concluding paragraph of the opinion discloses the scope of the decision:

> "Confining ourselves now to the precise and narrow question presented upon the records here before us, we hold that the conversion of petitioners from state into federal associations is of no effect when voted against the protest of Wisconsin. Beyond that we do not go . . . ." (296 U. S. at 343).

The Pennsylvania court stressed the effect of the decision in the *Savings and Loan Association* case upon the decision of this court in *Casey* v. *Galli*, 94 U. S. 673, 24 L. ed. 168. It is true that the court in the *Savings and Loan* case concludes that the *Galli* case did not decide a question of constitutional power; but it points out (296 U. S. at 342-343) that the contravention clause was later inserted in the statute and this court clearly implied that this amendment cured the constitutional difficulty.

It is thus apparent that the *Savings and Loan* case does not support the theory that affirmative consent of the state is required to

* Italics supplied.

effectuate the purpose of Congress in the consolidation statute. On the contrary, that decision clearly implies that consolidations are valid if they are not in contravention of the state law.

The decisions of this court thus indicate unmistakably that silence of the state statutes and policy as to consolidation of state banks into national banks, is not negation but consent; that the federal statute operates according to its terms unless in contravention of state law.

IV

IT WAS THE EXPRESSED INTENT OF CONGRESS TO EXERCISE ITS POWER TO VEST IN THE CONSOLIDATED BANK EVERY RIGHT OF THE STATE BANK EXCEPT TO THE EXTENT BARRED BY THE POSITIVE LAW OF THE STATE.

As appears from the discussion above ("III"), expressed consent of the state is not required to supplement the power of the national government to absorb a state bank into a national bank. Silence is consent. When, as in Vermont, there is no law in contravention, the effect of consolidation is to be determined from the intent of Congress as manifested by the language of the statute. That statute gives the sanction of law to the transformation of the corporate status.

The terms of the federal statute having to do with the vesting of the franchise and property of the state corporation in the consolidated corporation are of all-inclusive scope. They cover "*all** the rights, franchises and interests" of the state bank in every species of property and "*all** rights of property, franchises and interests including the right of succession as trustee, executor or in any other fiduciary capacity." The untrammeled scope of this statute has a single limitation,—the provision that the consolidation shall not be "in contravention" of the state law.

* Italics supplied.

In the absence of contravening state law, the terms of the statute make apposite the language used by Mr. Justice Cardozo at the close of his opinion in *Baltimore National Bank* v. *State Tax Commission,* 297 U. S. 209 at 218.

> "Across the petitioner's path there still lies the stumbling block of that uncompromising 'all.' "

State courts have passed upon the effects of consolidations under the federal statute as it was at the time of the consolidation involved here. They have recognized the persistence of the state corporate entity within the consolidated national bank.

Central United National Bank v. *Abbott* (1939, 135 Ohio St. 37, 18 N. E. (2d) 981, 983.
Guardian Depositors Corp. v. *Currie* (1940), 292 Mich. 549, 560, 291 N. W. 2, 6.

This court has held that upon conversion of a state bank into a national bank, the identity of the state bank persists in the national bank, as one and the same bank "under a changed jurisdiction."

Metropolitan National Bank v. *Claggett,* 141 U. S. 520, 12 S. Ct. 60, 35 L. ed. 841.
Michigan Insurance Bank v. *Eldred,* 143 U. S. 293, 12 S. Ct. 450, 36 L. ed. 162.

See, also,

Coffee v. *The National Bank of the State of Missouri* (1870), 46 Mo. 140, 2 Am. Rep. 488.
In re Barriero (1932), 125 Cal. App. 153, 13 P. (2d) 1017.

Thus without any affirmative action of the state, the federal statute could have authorized a conversion of City Trust Company into a national bank without disturbing its identity. After this

conversion the same identity could have been preserved upon consolidation with Howard National Bank.

Cannon v. *Dixon* (C. C. A. 4, 1940), 115 F. (2d) 913.

It would be strange indeed if it were the intent of Congress that direct consolidation should be less effective than conversion followed by consolidation, to preserve a continued corporate identity within the consolidated national bank.

After the consolidations considered in the above cited Ohio, Michigan and Circuit Court of Appeals cases had been effected, and before the times of the decisions, amendment had been inserted in the federal statute which in terms provided that "upon such a consolidation or upon a consolidation of two or more national banking associations under section 33 of this title, the corporate existence of each of the constituent banks and national banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and the consolidated association shall be deemed to be the same corporation as each other constituent institution." And that the consolidated corporation "without any order or other action on the part of any court or otherwise, shall hold and enjoy the same and all rights of property, franchises, and interests including appointments, designations, and nominations and all other rights and interests as trustee, executor, administrator," etc.

The amendment also contained considerable changes with respect to the rights of stockholders and other matters.

Before this insertion there had been no provision with respect to the transfer of fiduciary capacity in the case of the consolidation of national banks.

The amendment was contained in the Act of June 16, 1933, c. 89, § 24, 48 Stat. 100 and originated in the House Bill. The report of the House committee as to this change (Report No. 150 May 1933, to accompany House Rule 5661) merely says:

> "This section also amends such act with respect to the property rights and the duties and powers of consolidated national banking institutions."

Thus with respect to the continuance of the identity of a constituent bank in a consolidated national bank, the act amplifies the statement but does not appear to have been intended to change existing law. The amendment in this regard falls within that class of legislative changes which was referred to by this court when it said:

> "We think it clear that the provision of the later act was intended to clarify the former rather than to change its import. . . .
>
> *Lawrence* v. *Shaw*, 300 U. S. 245, 249, 57 S. Ct. 443, 81 L. ed. 623.

That this was the view of the Circuit Court of Appeals for the 4th Circuit because it is indicated by its language used after the amendment, with reference to a consolidation before the amendment;

> ". . . . the great weight of authority is to the effect that in a consolidation of two national banks the identity of the banks is continued in the consolidated bank.
>
> " 'The purpose of the federal statute as to consolidation of national banks is to continue the identity of the old national bank in the bank into which it is consolidated.' "
>
> *Cannon* v. *Dixon* (1940), 115 Fed. (2d) 913.

In the Ohio case above cited in was urged that at the time of consolidation no statute provided any continuance of the state corporate entity in the consolidated bank and that subsequently the Ohio Legislature so provided. The Ohio Court said:

> "The defendants insist upon implication that the Legislature thereby manifested the intention to change the existing law. The difficulty with this contention is that there is

nothing in this language or in the context to so indicate. Legislatures frequently reduce existing general rules of law to statutory form."

Central United National Bank v. *Abbott*, 135 Ohio (1939), 37, 42, 18 N. E. (2d) 981, 983.

The language of the Ohio court is as applicable to the amendment of the national act as it is to the state legislation.

V

NO STATE MAY BURDEN OR CONTROL A NATIONAL BANK OR IMPAIR ITS EFFICIENCY TO EXERCISE ITS POWERS UNDER THE LAWS OF THE UNITED STATES.

NO STATE MAY TAX A NATIONAL BANK, DIRECTLY OR INDIRECTLY EXCEPT AS CONGRESS PERMITS.

The immunity of national banks from state control arises out of the paramount character of the national sovereignty within its jurisdiction and the immunity from taxation is a part of the broader immunity. A short extract from the brief filed by this petitioner in the Vermont Supreme Court, printed as an appendix hereto, discloses the claim which this petitioner made below in support of its pleading.

A

A state may not control or share in the control of a national bank as an instrumentality of the United States.

The Vermont Supreme Court holds that the federal statute authorizing consolidation of state and national banks may operate in Vermont and that it is not in contravention of the laws of that state. But it asserts that notwithstanding the legal consolidation, the state retains the power to regulate, control, tax and destroy a state corporation after it has been consolidated into a national bank.

It thus asserts that the national government is without power to protect from state injury, the national instrumentality created, unless the state expressly abdicates its power. But this is in sharp conflict with correct legal principles.

The paramount authority of the United States with reference to national banks and their immunity from any kind of state control except to the extent which Congress may authorize, has been frequently stated by this Court. It is true, of course, that the activities and transactions of national banks in their daily course of business are governed to a large extent by state law, but state laws may not operate when "they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks are created, or impair their efficiency to discharge the duties imposed upon them by the laws of the United States."

> *McClellan* v. *Chipman*, 164 U. S. 347, 17 S. Ct. 85.
> *Davis* v. *Elmira Savings Bank*, 161 U. S. 175, 16 S. Ct. 502, 40 L. ed. 700.
> See, also, *Smith* v. *Kansas City T & T Co.*, 255 U. S. 180, 208, 41 S. Ct. 243, 65 L. ed. 577.

In a case dealing with taxation of national banks under a state statute claimed to be in violation of their rights under federal law, this court held that the question was not one of constitutionality of the state statute but of its conflict with federal law. It said: "The declaration of the supremacy clause (Article VI, cl. 2 of the Constitution) gives superiority to valid federal acts over conflicting state statutes."

> *Ex parte Bransford*, 310 U. S. 354, 358, 359, 60 S. Ct. 947, 84 L. ed. 1249.

So in a case dealing with the enforcement of a stock assessment against a stockholder of the national bank and to collect from him a note payable to the bank, this court recently said:

> "The national Act (12 U. S. C. A. § 21 *et seq.*) constitutes 'by itself a complete system for the establishment and

government of national banks' *Cook County National Bank* v. *United States*, 107 U. S. 445, 448, 2 S. Ct. 561, 564, 27 L. ed. 537."

Deitrick v. *Greaney*, 309 U. S. 190, 194, 60 S. Ct. 480.

In a case which involved the status of a state insolvency law while a national bankruptcy statute was in effect, this court said:

> "It is apparent, without comparison in detail of the provisions of the Bankruptcy Act with those of the Arkansas statute, that intolerable inconsistences and confusion would result if that insolvency law be given effect while the national act is in force. Congress did not intend to give insolvent debtors seeking discharge, or their creditors seeking to collect claims, choice between the relief provided by the Bankruptcy Act and that specified in state insolvency laws. States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations."
>
> *International Shoe Co.* v. *Pinkus*, 278 U. S. 261, 265, 49 S. Ct. 108, 73 L. ed. 318.

The supremacy of the national laws with respect to national banks and the completeness of that system of laws require that the government of national banks and all of their corporate affairs shall be free from "intolerable inconsistencies and confusion" which would result if the state might exert a power to regulate, control, tax and destroy a corporation which had been consolidated with a national bank under national law not in contravention of state law. Indeed the unified control is so essential that this court, in passing upon a state statute with respect to receipt of deposits while insolvent, said:

> "But we are unable to perceive that Congress intended to leave the field open for the states to attempt to promote the welfare and stability of national banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and confusion

> would necessarily result from control possessed and exercised by two independent authorities."
>
> *Easton* v. *Iowa*, 188 U. S. 220, 232, 23 S. Ct. 288, 47 L. ed. 452.

Petitioner therefore submits that the national power to effectuate complete consolidation when not in contravention of state law, is not dependent upon the state's assent and is inconsistent with a continuance of state control.

B

The states are precluded from burdening a national bank by direct or indirect taxation, except as Congress permits.

In *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, 666, 43 L. ed. 850, 852, 19 S. Ct. 537, this court had under consideration the validity of a franchise tax assessed upon a national bank. In denying the tax, it applied the rule enunciated by this court in *Davis* v. *Elmira Savings Bank* (*supra*), and applied to the Bank of the United States in *M'Culloch* v. *Maryland*, 4 Wheaton, 16, 4 L. ed. 579, and *Osborn* v. *Bank of the United States*, 9 Wheaton 738, 6 L. ed. 204. After stating the rule of immunity from state interference, the court said:

> "It follows then necessarily from these conclusions that these respective states would be wholly without power to levy *any tax, either direct or indirect,** upon the national banks, their property, assets, or franchises, were it not for the permissive legislation of Congress." (173 U. S. 668.)

It was the decision in the *Owensboro* case, since frequently quoted, that the federal statute permitting taxation "prescribes the full measure of the power of the several states to impose taxes upon national banking associations or their stockholders. Any assessment not in conformity is unauthorized and invalid."

> *First National Bank of Gulfport* v. *Adams*, 258 U. S. 362, 364, 42 S. Ct. 323, 66 L. ed. 661.

* Italics supplied.

Bank of California v. *Richardson*, 248 U. S. 476, 39 S. Ct. 165, 63 L. ed. 372.
Maricopa County v. *Valley National Bank*, No. 449, Decided March 1, 1943, 63 S. Ct. 587.

In determining whether a national instrumentality is subjected to an unlawful state tax, the court looks to the incidence of the burden, not merely to the designation of the taxpayer. "The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself."

Colorado National Bank v. *Bedford*, 310 U. S. 41, 52, 60 S. Ct. 800, 84 L. ed. 1067, citing *Stahman* v. *Vidal*, 305 U. S. 61, 59 S. Ct. 41, 83 L. ed. 41.
And see *Bank of California N. A.* v. *Richardson*, 248 U. S. 476, 485, 39 S. Ct. 165, 63 L. ed. 372.
Federal Land Bank v. *Crossland*, 261 U. S. 374, 43 S. Ct. 385, 67 L. ed. 703.
Pittman v. *Home Owners Loan Corp.*, 308 U. S. 21, 60 S. Ct. 15, 21, 84 L. ed. 11.

This immunity from tax burden is protected from impairment of its functions. In the case last named this Court said:

> "Congress has not only the power to create a corporation to facilitate the performance of governmnetal functions, but has the power to protect the operations thus validly authorized. 'A power to create implies a power to preserve.' *McCulloch* v. *Maryland, supra*, 4 Wheat. Page 426, 4 L. ed. 579."

In striking down a sales tax upon purchases by federal land banks in furtherance of its lending power this Court recently said:

> ". . . . when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental."

Federal Land Bank v. *Bismark Lumber Co.*, 314 U. S. 95, 102, 62 S. Ct. 1, 86 L. ed. 146.

Thus the protection goes to all functions.

VI

THE ACTS OF THE STATE OF VERMONT IN IMPOSING A LICENSE TAX UPON CITY TRUST COMPANY AFTER ITS CONSOLIDATION AND IN REVOKING ITS CHARTER CONSTITUTED A BURDEN UPON THE CONSOLIDATED NATIONAL BANK WHICH VIOLATED ITS IMMUNITIES AND IMPAIRED ITS EFFICIENCY TO EXERCISE ITS POWERS CONFERRED BY NATIONAL LAW.

The Vermont Supreme Court sanctioned the control of the state corporation, after consolidation, exercised by the state through a license tax, nominally upon the constituent state bank but actually upon the consolidated national bank, and through denial to the national bank, if it failed to pay that tax, of the right to continue to enjoy, through the state bank, rights which the national law conferred upon the national bank.

A

The tax which operated to destroy the constituent state bank was in effect a tax upon Howard National Bank and Trust Company.

The consolidated national bank was under the compulsion of paying the tax, if valid, to protect its powers and rights, whatever the status of the state corporation,—whether the tax was upon the right of a constituent part of the consolidated national bank to continue to preserve its identity within the consolidated bank, or was a tax upon a franchise not integrated with the consolidated national bank but held by it as a right in the nature of property.

1. *The state corporation had neither the means nor the capacity to pay a separate tax.*

As shown above (I, 1) City Trust Company had been validly consolidated into Howard National Bank and Trust Company. All of the affairs of the constituent state bank were under the

management of the consolidated bank (*supra* I, 3). All of its property, general and special, and all of its rights had passed to the consolidated bank and all of its business.* Thus, independently of the consolidated bank, the constituent state bank had no capital, property or assets, no "business," no stockholders, no officers. Whatever affected its finances or its business equally affected the consolidated bank. None of these foregoing facts find denial in the opinion of the state court.

2. If the charter rights of the state corporation did not merge in the consolidated national bank it acquired rights in them. In effect the two banks became one as contemplated by the federal statute. A tax on the state franchise was a tax on a franchise owned by a national bank.

The Vermont Courts said that "there was no statute of this state permitting the transfer of the City Trust Company's right to be a corporation. This right, therefore, remains subject to our law." (*Op. par. 19, Rec. 57.*)

The Vermont court does not say, and does not imply, that the charter franchise remained unaffected by the consolidation.

It cannot have meant that the persons named in the charter or the former stockholders retained a right to do business as a corporation independently of the consolidated corporation, so that after the consolidation there were, as before, two banks, each entitled to function indepentently of the other.

* The Vermont Court recognized that "the consolidation was not a sale, lease or exchange of assets," citing *"Petition of Worcester County National Bank*, 263 Mass. 444, 162 N. E. 217, 219." That case holds that a similar Massachusetts statute did not apply to a similar consolidation but a statutory provision that "The charter of a trust company, the business of which shall . . . . be consolidated or merged with or absorbed by another bank or trust company shall be valid." . . . The Vermont court thus indicates that all the "business" of the constituent bank passed to the consolidated bank as an incident of consolidation. Certainly such was the effect of consolidation under the federal statute.

It cannot have meant that the stockholders of the state bank, who had taken the steps necessary to merge the business of the state bank with the national bank, were at liberty to conduct a banking business as "City Trust Company" by virtue of the charter which City Trust Company held before the consolidation.

At the least, the acts of the stockholders, taken under the authority of the national law, operated through the national law to vest in the consolidated corporation ownership of the property rights in the state corporate franchise. This construction is within the express terms of the federal statute. It declares that "all . . . . franchises shall be transferred to and vested in such national banking associations" which shall "hold and enjoy them."—language apposite to ownership of property rights. Under such a constuction the corporate franchise passes under the control of the national bank. It becomes a part of the mass of assets which the bank owns and manages. The benefits of that ownership, and the right to them, are the property of the bank. This property in the corporate franchise created by the state and the benefits thereof, is held with the same incidents as other property, held by a national bank.

In such circumstances the two banks would become one, with a single ownership, a single business and a single management, under the authority of national law. There would be two charter franchises, but only one bank and that bank a national bank.

A tax upon either charter franchise was a tax upon the national bank. It was none the less a tax and none the less illegal because not assessed directly. See, *supra*, V, B.

If the rights in the state franchise which upon this theory was held in its entirety by the consolidated national bank had been divided into shares, and the bank owned a share of the stock representing the franchise and the other property of the state corporation, it could not have been taxed on account of that share. *Bank of California* v. *Richardson*, 248 U. S. 476, 39 St. Ct. 165, 63 L. ed. 372. There is an entire absence of reason why the bank

should bear the burden of the tax upon the gross franchise when it could not be taxed with respect to ownership of any part.

B

The destruction of the charter of City Trust Company impaired the right of Howard National Bank and Trust Company to perform its functions and exercise the powers conferred upon it by national law and deprived it of benefits therefrom.

As indicated above (I, 2) the Vermont Court held that no vacancy occurred in the office of executor of the Watkins' will until City Trust Company ceased to exist. Thus, the Court said: "Its authority as executor was thereupon extinguished." (*Op. par. 20, Rec. 58.*)

The assets of the estate were in the custody of the consolidated bank. The consolidated bank had an interest in them as the result of consolidation. Thus, this Court said in *Ex parte Worcester County National Bank* (279 U. S. at 360):

> "Because of the interest of the national bank in all of the assets of the Trust Company, including the estate at bar, transferred to its custody, the bank would seem to have a right to make such an application to the probate court and await action of that court." (The application referred to was for appointment as administrator because the charter of the state bank which, previous to consolidation had been administrator, was made void by statute at the time of consolidation.)

In the interval of more than a year from the date of consolidation to the date of revocation of the charter of City Trust Company, April 1, 1932, the duties of the executor must of necessity have been performed by the consolidated bank. Otherwise the administration of the estate would have been completely immobilized during this entire period. City Trust Company having been enabled through the consolidated bank to perform the functions of an executor, was entitled to payment for that service but City Trust Company could have no separate treasury because of the effect of

the consolidation. The emoluments of the office of executor would inure to the benefit of the consolidated bank. Thus, the consolidated bank in the right of its constituent state bank was performing the duties and entitled to receive the emoluments of the office of executor.

Whether the state bank entity was merged in the national association or its franchise held as in the nature of a property right, in either event the continued existence of City Trust Company permitted the consolidated bank to exercise through the Trust Company entity, fiduciary powers conferred upon national banks by national law. Destruction of City Trust Company destroyed the opportunity to exercise those powers in the instant case, if the national bank could not itself succeed as executor.

C.

The tax sanctioned by the Vermont court, in effect upon the consolidated national bank, was illegal as a tax not within the permission of Congress.

1. The State of Vermont, in 1932 and since, has included dividends derived from shares of national banks located within the state in the taxable income of the owners or holders (Subd. II of Sec. 3 of Part I, read with Sec. 18 of Part II of No. 17 of the Acts of 1931). By the provisions of subd. (e) of said subd. II of Sec. 3, dividends from domestic corporations taxed on account of their franchises are exempt from inclusion in individual income for taxation.

By the terms of the federal statute* the imposition of this method of taxing national banks or their stock is in lieu of any other tax except upon real estate.

The tax involved in the instant case is not a tax upon real estate. It is not a tax such as Congress has authorized, even if it were the sole tax assessed against the national bank.

* R. S. Sec. 5219 as amended March 4, 1923, c. 267, 42 Stat. 1499 and March 25, 1936, c. 88, 44 Stat. 223, subd. 1 (a) 12 U. S. C. A. Sec. 548, subd. 1 (a).

2. The tax here challenged is a corporate license tax of arbitrary amount, which may not be imposed with respect to activity of corporations which are entitled to do business in the State of Vermont, by virtue of paramount federal law.

In *International Text Book Company* v. *Lynch*, 81 Vt. 101, 69 Atl. 541, reversed, 218 U. S. 664, 31 S. Ct. 225, 54 L. ed. 1201, the Vermont Supreme Court and this court had under consideration the license tax statute invoked in this case as the basis of destruction of the state corporation.

Both the State Supreme Court and this Court recognized that the tax was imposed upon the right of a foreign corporation to do business in the state as a corporation. Both recognized that the tax was invalid if the corporation had a right to do business in the state without the permission of the state. The question turned upon whether the business done was interstate commerce. This court held the business to be interstate and the tax invalid upon the authority of *International Text Book Co.* v. *Pigg*, 217 U. S. 91, 30 S. Ct. 481, 54 L. ed. 678.

It is thus the settled law of this court that the State of Vermont may not impose the tax involved in this case upon a corporation which functions within the state under sanction of the law or Constitution of the United States.

D

The tax here involved was not within the permission of Congress and is an unauthorized burden upon the exercise of rights and privileges conferred by paramount federal law.

In any aspect, the tax sanctioned by the state court is beyond the power of the state because "the measure adopted is essentially inimical to national banks, frustrating the purpose of the national legislation, or impairing their efficiency as federal agencies."

Clement National Bank v. *Vermont*, 231 U. S. 120, 135, 34 S. Ct. 31, 58 L. ed. 147.

Bank of California v. *Richardson*, 248 U. S. 476, 483, 39 S. Ct. 165, 63 L. ed. 372.

The fact that the tax is not incurred unless the taxpayer elects to act to protect itself from other losses or damages makes it no less burdensome than if unconditionally assessed.

Federal Land Bank v. *Crossland*, 261 U. S. 374, 43 S. Ct. R. 385.
Pittman v. *H. O. L. C.*, 308 U. S. 21, 60 S. Ct. 15, 84 L. ed. 8.
Louisville Gas & Electric Co. v. *Coleman*, 277 U. S. 32, 48 S. Ct. 423, 72 L. ed. 770.

VII

THE DETERMINATION BY THE VERMONT COURT THAT THE CONSOLIDATED BANK DID NOT BECOME EXECUTOR IN THE RIGHT OF THE CONSTITUENT STATE BANK WAS AN ERRONEOUS DECISION UPON A QUESTION RAISED UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES.

The probate law of Vermont is to be determined by the courts of that state and that determination is binding on the federal courts. The application of the national banking laws to the state probate law, so determined, is a question of federal rather than state law.

Here the determination of the non-federal question will not sustain the judgment without the determination of the operation and effect of the national law. It follows that this court may review and redetermine whether the executorship vested in the consolidated bank. See

Ex parte Worcester National Bank, supra (279 U. S. 347 at 359, 49 S. Ct. 368, 73 L. ed. 733.
Abie State Bank v. *Weaver*, 282 U. S. 765, 773, 51 S. Ct. 252, 75 L. ed. 690.

1. *The state court determined that the consolidated bank did not become the legal executor because it was not named in the will.*

The court held that under Vermont law an executor is one "appointed as such by the testator in his will. The probate court has no power of choice" and there is no right of assignment or succession. (*Op. par. 17, Rec. 50-51.*)

The Vermont court points out that by statute there is in Vermont no right of succession of an executor or administrator of a deceased executor. No other provision of Vermont law which varies from generally accepted rules of executorship is suggested, unless it is by the court's denial that a testator who names a corporation as an executor contemplates and assents to consolidation and merger. Neither proposition is counter to the right of a corporate executor, continued in life in a consolidation, to continue to hold the office of executor.

The Vermont Court held that the executorship of City Trust Company continued after consolidation until that corporation was dissolved, as discussed above, notwithstanding the facts show that the consolidated bank had all the assets, that its management was the management of the state bank and that the constituent state bank neither did, nor could do, an independent business.

If the executorship of City Trust Company could continue when all its assets including the assets of the estate were in the possession of the consolidated bank and it neither had, nor could have, independent management or an independent business, it is clear that the executorship could continue if the City Trust Company's corporate entity continued within, rather than outside, the consolidated bank. The denial of the executorship to the consolidated bank is because it was a different corporation than the state bank which was named as executor. If, however, the Vermont Court had determined that the whole corporate entity of the state bank had been taken over and persisted in the consolidated national bank, it must have reached the conclusion that the consolidated bank was the corporation named in the will and therefore was the executor.

The right of the consolidated bank to executorship is thus dependent upon the continuance of the corporate entity of the state bank within the consolidated bank.

2. The intent and the effect of the federal statute as to consolidation was to provide that the state corporate entity shall continue in the consolidated national bank.

This intent is discussed above under "IV." As there shown it was the expressed intent of Congress that "all" franchises of the state bank should continue in the consolidated national bank to use the language of the Act "in the same manner and to the same extent as was held and enjoyed by such State . . . . bank." The persistence of the state entity in the national bank notwithstanding the change in charter was a concept long before established by this court in conversion cases (*National Bank* v. *Claggett* (1891), 141 U. S. 520, and *Michigan Insurance Bank* v. *Eldred* (1892), 143 U. S. 293) and must be deemed to have been within the knowledge of Congress. In *Ex parte Worcester County National Bank, supra* (279 U. S. 347), effect could not be given to this intention because of the controlling fact that continuance of the state corporate entity was in contravention of the statute law of the state. But other courts have held that the state entity continued in the consolidated national bank as a consequence of consolidation effected under the statute as it stood when the consolidation here involved was effected. (*Central United National Bank* v. *Abbott, supra*, 135 Ohio St. 37; *Guardian Depositors Corporation* v. *Currie, supra*, 292 Mich. 549, 560.) The Circuit Court of Appeals of the Fourth Circuit has reached a similar conclusion with respect to the continuance of the consolidating corporations when national banks consolidate (*Cannon* v. *Dixon*, 115 F. (2d) 913).

Petitioner therefore urges that, since the Vermont Court has determined that consolidation under the federal statute was not in contravention of Vermont law, that statute operated to continue the state corporate entity within the consolidated national bank;

and that the consolidated national bank was, therefore, the person named as executor and holding the office of executor.

3. *Effect should have been given to the intent of the national legislation and thereby the executorship recognized as continuing in the consolidated national bank.*

Since, as held by the Vermont Court, City Trust Company continued as executor, and, since, as intended by the national statute, City Trust Company continued, with identity preserved, in the consolidated national bank, the national bank was the executor "in the same manner and to the same extent" as its constituent entity City Trust Company had been. This was the conclusion reached by the Florida court in

Adams v. *Atlantic National Bank* (1934), 115 Fla. 399, 155 S. 648.

It is in harmony, as pointed out by the Florida Court, with the decision of this court in *Ex parte Worcester County National Bank, supra,* and with general principles of law as to consolidation where the constituent entities are preserved in the consolidated corporation. See *Thomas* v. *National Bank,* 187 Wash. 521, 60 P. (2d) 264.

The result differs from that reached by the Vermont Court, not because of the determination of Vermont law by that court, but by reason of the failure of that court to give effect to the language and intent of the federal statute under which the consolidation was effected.

VIII

A CORRECT DECISION OF THE INSTANT CASE IS OF GENERAL IMPORTANCE.

It is apparent that the decision of this case is of great importance to petitioner because if the decision of the state court is allowed to stand, petitioner will not only lose the benefits of the executorship but be subjected to liabilities as an intermeddler,

which will have arisen because of its reliance upon the effectiveness of national legislation.

But the effect of the decision of the Vermont Supreme Court extends to the situation of a large number of consolidated national banks in states where the state charter is not destroyed by consolidation.

If states may exact license taxes from a state corporation the substance of which has passed into a national corporation, the power may be exercised without substantial restraint. The essential difference between an operating corporation and such a shell as the Vermont and Pennsylvania Courts recognize, would furnish a basis of classification permitting onerous burdens upon the shells without equally burdening other state corporations. Thus, it would be difficult, if not impossible, to set limits to the exercise of the power of the states as to such taxation, if not restrained by the immunity of national banks.

The injury which a national bank would suffer from the destruction of the state corporate entity, might compel payment of large and burdensome exactions as less injurious than loss of the property and earning power connected with the state bank. Loss of guaranties and fiduciary rights, suggested by cases hereinbefore discussed, are by no means the measure of the possible injury from destruction of the state entity.

A reasonable protection of instrumentalities of the United States from injury by the states demands the review and reversal of the decision of the Vermont Court in the instant case.

Respectfully submitted,

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